



FEDERAL TRADE COMMISSION

16 CFR Part 680

RIN 3084–AB63

Affiliate Marketing Rule

AGENCY: Federal Trade Commission.

ACTION: Final rule.

SUMMARY: The Federal Trade Commission (“FTC” or “Commission”) is issuing a final rule (“Final Rule”) to amend its Affiliate Marketing Rule to correspond to changes made to the Fair Credit Reporting Act (“FCRA”) by the Dodd-Frank Act.

DATES: This rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

FOR FURTHER INFORMATION CONTACT: David Lincicum (202-326-2773), Division of Privacy and Identity Protection, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

I. Background

A. The Affiliate Marketing Rule

The Fair and Accurate Credit Transactions Act of 2003 (“FACT Act”) was signed into law on December 4, 2003. Public Law 108-159, 117 Stat. 1952. Section 214 of the FACT Act added a new section 624 to the FCRA. This provision gives consumers the right to restrict a person from using certain information obtained from an affiliate to make solicitations to that consumer. Section 624 generally provides that if a person receives certain consumer eligibility information from an affiliate, the person may not use that information to make solicitations to the consumer about its products or services, unless the consumer is given notice and an opportunity (via a simple method) to opt out of such

use of the information, and the consumer does not opt out. The statute also provides that Section 624 does not apply, for example, to a person using eligibility information: (1) to make solicitations to a consumer with whom the person has a pre-existing business relationship; (2) to perform services for another affiliate subject to certain conditions; (3) in response to a communication initiated by the consumer; or (4) to make a solicitation that has been authorized or requested by the consumer. Unlike the FCRA affiliate sharing opt-out (15 U.S.C. 1681a(d)(2)(A)(iii)) and the opt-out of sharing with non-affiliated third parties under the Gramm-Leach-Bliley Act (“GLBA”), 15 U.S.C. 6801 *et seq.*, which apply indefinitely, Section 624 provides that a consumer’s affiliate marketing opt-out election must be effective for a period of at least five years. Upon expiration of the opt-out period, the consumer must be given a renewal notice and an opportunity to renew the opt-out before information received from an affiliate may be used to make solicitations to the consumer.

The Commission published regulations implementing Section 624, the Affiliate Marketing Rule, 16 CFR part 680, on October 30, 2007.¹

B. Dodd-Frank Act

The Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”) was signed into law in 2010.² The Dodd-Frank Act substantially changed the federal legal framework for financial services providers. Among the changes, the Dodd-Frank Act transferred to the Consumer Financial Protection Bureau (“CFPB”) the Commission’s rulemaking authority under portions of the FCRA.³ Accordingly, in 2012, the Commission rescinded several of its FCRA rules, which had been replaced by rules issued by the CFPB.⁴ The FTC retained rulemaking authority for other rules promulgated

¹ 72 FR 61423 (October 30, 2007). Model forms for opt-out notices are published at 16 CFR part 698, appendix B.

² Pub. L. 111-203 (2010).

³ 15 U.S.C. 1681 *et seq.* The Dodd-Frank Act does not transfer to the CFPB rulemaking authority for section 615(e) of the FCRA (“Red Flag Guidelines and Regulations Required”) and section 628 of the FCRA (“Disposal of Records”). *See* 15 U.S.C. 1681s(e).

⁴ 77 FR 22200 (April 13, 2012).

under the FCRA to the extent the rules apply to motor vehicle dealers described in section 1029(a) of the Dodd-Frank Act⁵ predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both (“motor vehicle dealers”).⁶ The rules for which the FTC retains rulemaking authority include the Affiliate Marketing Rule, which now applies only to motor vehicle dealers.⁷ Entities that are not motor vehicle dealers are covered by the CFPB’s Regulation V, subpart C, which is substantially similar to the Commission’s rule.⁸

II. Regulatory Review of the Affiliate Marketing Rule

On September 22, 2020, the Commission solicited comments on the Affiliate Marketing Rule as part of its periodic review of its rules and guides.⁹ The Commission sought information about the costs and benefits of the rule, and its regulatory and economic impact. In addition, the Commission proposed amending the rule to narrow its scope to motor vehicle dealers excluded from CFPB jurisdiction as described in the Dodd-Frank Act.¹⁰ The Commission received no comments.

III. Overview of Final Rule

The Commission promulgated the Affiliate Marketing Rule at a time when it had rulemaking authority for a broader group of entities. While the Dodd-Frank Act did not change the Commission’s enforcement authority for the Affiliate Marketing Rule, it did narrow the Commission’s rulemaking authority with respect to the rule. It now covers only motor vehicle dealers. The amendments in the Dodd-Frank Act necessitate a technical revision to the Affiliate Marketing Rule to ensure the regulation is consistent

⁵ 12 U.S.C. 5519.

⁶ 77 FR 22200 (April 13, 2012).

⁷ *Id.*

⁸ 12 CFR 1022.20 through 1022.27. There are no substantive differences between the two rules, but the two rules are organized differently and, in some cases, use different examples. *See, e.g.*, 12 CFR 1022.20(b)(4)(iii).

⁹ 85 FR 59466 (September 22, 2020).

¹⁰ 12 U.S.C. 5519.

with the text of the amended FCRA. Accordingly, the Commission amends the Affiliate Marketing Rule to properly reflect the rule's scope.

The amendment to § 680.1(b) narrows the scope description of the Affiliate Marketing Rule to the entities excluded from CFPB jurisdiction as described in the Dodd-Frank Act.¹¹ It does so by replacing the broad term "person" with the term "motor vehicle dealer," as defined in amended § 680.3.

The amendment to § 680.3 adds a definition of "motor vehicle dealer" that defines motor vehicle dealers as those entities excluded from CFPB jurisdiction as described in the Dodd-Frank Act.¹²

The amendments do not change the substantive provisions of the rule or the examples in the rule, even where those provisions and examples involve entities covered by the CFPB's rule rather than the Commission's rule. The primary reason for retaining these provisions and examples is that the rule addresses the relationship between covered motor vehicle dealers and their affiliates, which may not be motor vehicle dealers. The obligations and exceptions set forth by the rule are inextricably linked to a consumer's relationship and actions in relation to all affiliates, both motor vehicle dealers and non-motor vehicle dealers. In order for the rule to apply meaningfully, it must address both types of entities, even those not directly covered by the rule. This will not create any conflict with the CFPB's corresponding rule, as the Commission's Affiliate Marketing Rule and the CFPB's rule are substantially similar and impose the same obligations and exceptions on entities they cover.

IV. Paperwork Reduction Act

The Affiliate Marketing Rule contains information collection requirements as defined by 5 CFR 1320.3(c), the definitional provision within the Office of

¹¹ *Id.*

¹² *Id.*

Management and Budget (“OMB”) regulations that implement the Paperwork Reduction Act (“PRA”). 44 U.S.C. 3501 *et seq.* OMB has approved the rule’s existing information collection requirements through February 28, 2023 (OMB Control No. 3084-0131). Under the existing clearance, the FTC has attributed to itself the estimated burden regarding all motor vehicle dealers and shares equally the remaining estimated PRA burden with the CFPB for other persons for which both agencies have enforcement authority.

The Final Rule amends 16 CFR part 680. The amendments do not modify or add to information collection requirements previously approved by OMB. The amendments make no substantive changes to the rule, other than to clarify that the scope of the rule is limited to motor vehicle dealers. The rule’s OMB clearance already reflects that scope. Therefore, the Commission does not believe the amendments substantially or materially modify any “collections of information” as defined by the PRA.

V. Regulatory Flexibility Act

The Regulatory Flexibility Act (“RFA”), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires an agency to either provide an Initial Regulatory Flexibility Analysis (“IRFA”) with a proposed rule, or certify that the proposed rule will not have a significant impact on a substantial number of small entities.¹³ The Commission published an Initial Regulatory Flexibility Analysis in order to inquire into the impact of the proposed rule on small entities.¹⁴ The Commission received no responsive comments.

The Commission does not believe these amendments have the threshold impact on small entities. The amendments effectuate changes to the Dodd-Frank Act and will not impose costs on small motor vehicle dealers because the amendments are

¹³ 5 U.S.C. 603-605.

¹⁴ 85 FR 59466, 59469 (Sept. 22, 2020).

for clarification purposes and will not result in any increased burden on any motor vehicle dealer. Thus, a small entity that complies with current law need not take any different or additional action under the Final Rule. Therefore, the Commission certifies that amending the Affiliate Marketing Rule will not have a significant economic impact on a substantial number of small businesses.

Although the Commission certifies under the RFA that the Final Rule will not have a significant impact on a substantial number of small entities, and hereby provides notice of that certification to the Small Business Administration, the Commission nonetheless has determined publishing a final regulatory flexibility analysis (“FRFA”) is appropriate to ensure the impact of the rule is fully addressed. Therefore, the Commission has prepared the following analysis:

A. Need for and Objectives of the Final Rule

To address the Dodd-Frank Act’s changes to the Commission’s rulemaking authority, the amendments clarify that the rule applies only to motor vehicle dealers.

B. Significant Issues Raised in Public Comments in Response to the IRFA

The Commission did not receive any comments that addressed the burden on small entities. In addition, the Commission did not receive any comments filed by the Chief Counsel for Advocacy of the Small Business Administration (“SBA”).

C. Estimate of Number of Small Entities To Which the Final Rule Will Apply

The Commission anticipates many covered motor vehicle dealers may qualify as small businesses according to the applicable SBA size standards. As explained in the IRFA, however, determining a precise estimate of the number of small entities is not readily feasible. No commenters addressed this issue. Nonetheless, as discussed above, these amendments do not add any additional burdens on any covered small businesses.

*D. Projected Reporting, Recordkeeping, and Other Compliance Requirements,
Including Classes of Covered Small Entities and Professional Skills Needed
To Comply*

The amendments impose no new reporting, recordkeeping, or other compliance requirements.

*E. Description of Steps Taken To Minimize Significant Economic Impact, If Any,
on Small Entities, Including Alternatives*

The Commission did not propose any specific small entity exemption or other significant alternatives because the amendments will not increase reporting requirements and will not impose any new requirements or compliance costs.

VI. Other Matters

Pursuant to the Congressional Review Act (5 U.S.C. 801 et seq.), the Office of Information and Regulatory Affairs designated this rule as not a “major rule,” as defined by 5 U.S.C. 804(2).

List of Subjects in 16 CFR Part 680

Consumer protection, Credit, Trade practices.

For the reasons stated above, the Federal Trade Commission amends part 680 of title 16 of the Code of Federal Regulations as follows:

PART 680—AFFILIATE MARKETING

1. Revise the authority citation for part 680 to read as follows:

Authority: 12 U.S.C. 5519(d); 15 U.S.C. 1681s-3; 15 U.S.C. 1681s-3 note.

2. In § 680.1, revise paragraph (b) to read as follows:

§ 680.1 Purpose and scope.

* * * * *

(b) *Scope*. This part applies to any motor vehicle dealer as defined in § 680.3 that uses information from its affiliates for the purpose of marketing solicitations, or provides information to its affiliates for that purpose.

3. In § 680.3, redesignate paragraphs (i) through (l) as paragraphs (j) through (m) and add a new paragraph (i) to read as follows:

§ 680.3 Definitions.

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(i) *Motor vehicle dealer*. The term “motor vehicle dealer” means any person excluded from Consumer Financial Protection Bureau jurisdiction as described in 12 U.S.C. 5519.

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By direction of the Commission.

April J. Tabor,

Secretary.